

NORTHWEST DIVISION  
CASE TRACKING SUMMARY SHEET

**COPY**

Subject Name	Robert Edward KERIVAN Bridgeview Vineyards, Inc. Howard Reuben PICKLE	CCN	NW020289
Vessel Name	N/A	Vessel ID#	
Officer/Agent Name	SA James M. Houseman	Investigation Type	ES

From: SA James M. Houseman		To: ASAC Cline	
Date: 3/16/04	Case Status: 20	Initials: <i>Jmt</i>	
Comments: Recommend case be referred to GCEL for prosecution review.			

From: ASAC Cline		To: DSAC Mahaffey	
Date: 3/16/04	Case Status: 20	Initials: <i>MSC</i>	
Comments: Forward case to GCEL.			

From: DSAC Mahaffey		To: EMIS Technician	
Date:	Case Status:	Initials:	
Comments:			

From: <i>Ranese</i>		To: <i>GC Moeller</i>	
Date: <i>03-26-04</i>	Case Status: <i>ENTERED 20/60</i>	Initials: <i>RM</i>	
Comments: <i>Referred to GCNW.</i>			

From:		To:	
Comments:		<div style="border: 1px solid black; padding: 5px; display: inline-block;"> <b>RECEIVED</b>  MAR 25 2004  Initials: </div>	
Date:	Case Status:		

From:		To: NOAA OFFICE OF GENERAL COUNSEL	
Date:	Case Status:	Initials:	
Comments:			

NOAA Form 88-149PC U.S. Department of Commerce NOAA, National Marine Fisheries Service  <b>OFFENSE INVESTIGATION REPORT</b>				Computer Control Number		NW020289	
				Date of Report		March 9, 2004	
				Enforcement Action Report No.			
NAME OF SUBJECT 1 (Last, First, Middle)				DATE OF BIRTH		SSN	
KERIVAN, Robert Edward				(b) (6)			
HOME ADDRESS (Number and Street)				CITY		STATE	ZIP
4210 Holland Loop Road, P.O. Box 609				Cave Junction		OR	97523
NAME OF SUBJECT 2 (Last, First, Middle)				DATE OF BIRTH		SSN	
PICKLE, Howard Reuben				(b) (6)			
HOME ADDRESS (Number and Street)				CITY		STATE	
4250 Holland Loop Road, (P.O. Box 622, Selma, OR 97538)				Cave Junction		OR	
NAME OF BUSINESS AND ADDRESS (Number and Street)				PHONE		RELATED CCN NUMBERS	
Bridgeview Vineyards, Inc., 4210 Holland Loop Road, P.O. Box 609				541-592-4688			
CITY/STATE	Cave Junction, OR	COUNTRY	US	ZIP CODE	97523		
VESSEL NAME				VESSEL/VEHICLE TYPE		VESSEL CALL SIGN OR LICENSE	
N/A							
HOME PORT				COUNTRY OF REGISTRY		HAILING PORT	
VESSEL OWNER OR BUSINESS				OWNER'S ADDRESS		PHONE #	
SEIZED PROPERTY (Receipt No., Description, Quantity, Total Value, Location where stored)							
N/A							
VIOLATION(S) SUMMARY: (Give a complete statement of facts following the listing of all violations.)							
Cnt #	Type	Viol Cd	Date/Time	Regulation or Statute #	Place of Violation	Fish Pln	
1	ES	I	November 13, 2002	16 USC § 1538 (a)(1)(B)	Sucker Creek, Josephine County, OR	OT	



Date: March 15, 2004  
To: Case File  
From: James M. Houseman, Special Agent  
Subject: Investigative Report - Case #NW020289, Violation of the Endangered Species Act

**SYNOPSIS:** On or about November 13, 2002, Robert KERIVAN and Howard PICKLE used a bulldozer with a thumb to create a 300-foot berm and install rip-rap that altered the active channel of Sucker Creek, Josephine County, OR. Sucker Creek is listed as critical habitat for the *threatened* Southern Oregon/Northern California (SONC) coho salmon (*Onchorynchus kisutch*). Their actions caused "harm" to SONC coho salmon in violation of the Endangered Species Act (ESA). Also, their actions were a violation of the Clean Water Act's (CWA) permit requirements, which are being investigated by the Environmental Protection Agency (EPA).

**VIOLATIONS:** Count one, it is unlawful for any person to "take" a threatened species in waters or on lands under the jurisdiction of the U.S., pursuant to the ESA found at 16 USC § 1538 (a)(1)(B) and included as Attachment #1. Pursuant to the ESA, "the term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Also, the below listed regulations further enumerate SONC coho salmon as a threatened species, establish an interim rule governing take, define harm, and designate critical habitat:

- Enumeration of SONC coho salmon as threatened species, Vol. 62 Federal Register (FR) No. 87, published May 6, 1997, and promulgated in 50 CFR § 223.102 (a)(4) (Attachment #2);
- Interim rule governing take of SONC coho salmon, Vol. 62 FR No. 138, published July 18, 1997, and promulgated in 50 CFR § 223.203 (a) (Attachment #3);
- Definition of harm, Vol. 64 FR No. 215, published November 8, 1999, and promulgated in 50 CFR § 222.102 (Attachment #4);
- Critical habitat designation for SONC coho salmon, Vol. 64 FR No. 86, published May 5, 1999, and promulgated in 50 CFR § 226.210 (Attachment #5).

Furthermore, 50 CFR § 222.102 (Attachment #4) defines “harm” as: “. . . an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.”

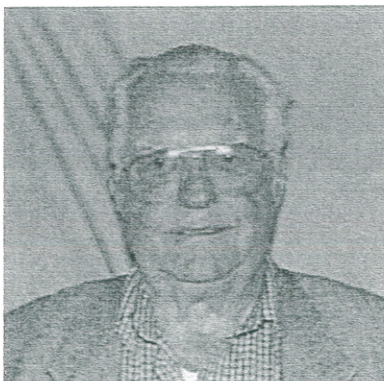
**SUBJECTS:** 1) Bridgeview Vineyards, Inc., (Figure 1) is located near Cave Junction, OR. Attachment #6 contains internet postings for Bridgeview Vineyards, Inc. According to the Secretary of State’s records, Bridgeview Vineyards, Inc., are an Oregon Corporation, Registry Number 447123-88, and filed for incorporation on March 8, 1995 (Attachment # 7). Attachment #8 is a correct copy of the title and deed for Bridgeview Vineyards, Inc., along Sucker Creek.



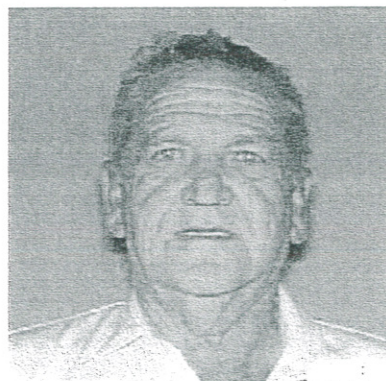
**Figure 1** Entrance to Bridgeview Winery at 4210 Holland Loop Road, Cave Junction, OR.

2) Robert E. KERIVAN (Figure 2) is the registered agent, incorporator, and director of Bridgeview Vineyards, Inc.;

3) Howard R. PICKLE (Figure 3) is an employee of Bridgeview Vineyards, Inc.



**Figure 2** Robert E. Kerivan, courtesy of OR DMV Services’ Oct. 21, 2002 file photo, retrieved on Dec. 11, 2002.



**Figure 3** Howard R. Pickle, courtesy of OR DMV Services’ August 28, 1998 file photo, retrieved on Dec. 11, 2002.



**NARRATIVE:** This case stems from a 1998 Josephine County criminal case, investigated by the Oregon State Police (OSP) against Robert E. KERIVAN, owner of Bridgeview Vineyards Inc., and employee Howard R. PICKLE for violations of Oregon's fill and removal statute. PICKLE was convicted in November 1999. KERIVAN was tried criminally for allegedly removing material out of the bed or banks of Sucker Creek without obtaining a permit from the Oregon Division of State Lands (DSL). KERIVAN was acquitted on April 26, 2001, with the court finding that the law clearly exempted activities associated with agriculture from the permit requirements. Following KERIVAN's acquittal, PICKLE was granted post conviction relief in June 2002. Additionally, the following court related documents were received from OR Department of Justice Assistant Attorney General Todd C. AINSWORTH on November 21, 2002 (one copy only with original OIR):

Howard PICKLE Criminal Trial Transcript 98 1184M (Attachment 9a)

Robert KERIVAN Criminal Trial Transcript 98 1185M (Attachment 9b)

Respondents Partial Motion for Summary Judgement with exhibits attached (Attachment 9c)

Petitioner's Opposition to Respondents Partial Motion for Summary Judgment (Attachment 9d)

Depositions of Robert KERIVAN and Howard PICKLE (Attachment 9e)

Attachment 9c (tabbed pages), are copies of correspondence between KERIVAN, DSL Resource Coordinator LUMLEY, and DSL Director CLEARY. CLEARY's February 23, 1999 reply letter to KERIVAN advised him that his proposed fill and removal project may require permits and consultation:

Your request may also require authorization by the U.S. Army Corps of Engineers and consultation with the National Marine Fisheries Service before they can issue a permit or authorization.

Later, as shown in Attachment 9e (tabbed pages), KERIVAN gave testimony in a deposition on June 12, 2002 related to his knowledge of the state and federal fill and removal statutes, endangered species, and coho salmon presence in Sucker Creek and Josephine County . On pages 50-52, 87-88, 92-93, 108-109, and 129, KERIVAN's testimony in response to AINSWORTH's questions reads as follows:

Pages 50-52

Q How did you know about the in-water work period?

A Well, I know all about the fill and removal law and all about the fish laws. I raised trout. I raised about six million of them for – that's another business I had I forgot to tell you about. This was a trout farm at one time, when I first started it.

Q Okay. So you knew about the removal/fill law, then, in August of 1998. I think that's what you are telling me?

A I knew about the fill and removal law when Bob Brown wrote me a letter in 1995.

Q And what was that over?

A And I wrote him back letting him know I knew the fill and removal law. I knew a little bit more than he knew.

Q What was the reason for the 1995 exchange between you and Brown?

A He wrote me a letter that I had been reported that they had seen a cat of mine in the river, and that because of the endangered species that had been declared that I could not do that, and to stop doing it. And I wrote him a letter back, stating that I could – it was my property. I could run my cat across the river or up and down the river if I so pleased. And I put it in writing.

Q Did you ever get a response to that?

A Never got a response. They didn't come and arrest me either. And I also told him at the time that he was incorrect, that there was no endangered fish in Josephine County. There was in every other county in the state of Oregon, but not Josephine County. And I told him in the letter the reason I knew that was that I paid the money to fight the petition and won. I fought the petition that was put through NMFS. I did that in 1993. By the way, the – you people up here, and the Mill Creek, next to your building at the DSL, they have endangered species on steelhead in there. We don't have endangered species on steelhead in our rivers because of myself. So I know the law.



Pages 87-88

Q In what way do you not agree with Cleary's letter?

A It says that there was endangered species in our rivers, and there are not, at that time. He was wrong.

Q Well, do you agree that Sucker Creek, as of August 5, 1998, had , in fact, legally been designated as an "E" stream?

A Yes, I was, but I was exempt.

Q But you were exempt. Okay. But were you involved in any way when designation as an "E" stream was actually made for Sucker Creek by your property?

A No more that what I had done in reference to the Endangered Species Act argument that we had going. I was real involved with that, and also with the O & C County Association.

Q Did you object to the designation of Sucker Creek as an "E" stream by your property when it was so designated?

A No, because I was exempt. Why should I?

Pages 92-93

Q Okay. Did you check with U.S. Army Corps of Engineers with respect to extending that old 1964 riprap?

A I didn't have to. I was exempt.

Q Under what? How were you exempt?

A I own the land. The Corps of Engineers don't own the land. They don't have any authority on my land. The only way they're going to get authority on my land is to do what I did. Buy it.

Q And how about the National Marine Fishery Service? Would that be the same answer there?

A What?

Q Whether or not you contacted or got any consultation with the National Marine Fishery Service?

A Oh, I had a lot of dealing with the National Marine Fisheries, yeah. We didn't have any endangered species at the time. There is now, but not then.

Q Did you respond –

A I didn't have to. I knew there was no endangered species. Cleary didn't know it, but I did.

Q Listen to my question. All I'm asking is whether or not in response to Cleary's letter you made any contact with the National Marine Fishery Service.

A No.

Pages 108-109

Q Okay. Evenson indicates in his letter of April 4, which is Exhibit 23, in his middle paragraph there on the first page, that he advised you that the project would likely require a consultation with NMFS, on listed Coho salmon. Did he tell you that?

A No, because I would have refuted him.

Page 129

Q How many times a year do you rock the roads?

A Usually two or three.

Q It also makes mention at the bottom of this same page of notes, 0034, says, "Looks like salmonids in creek. Marty and I saw Coho one-and-a-quarter inches."

A I don't agree with that.

Q Why?

A Because I don't think he's that smart. I raised fish. I don't think he could find a – he wouldn't know a Coho from a trout.

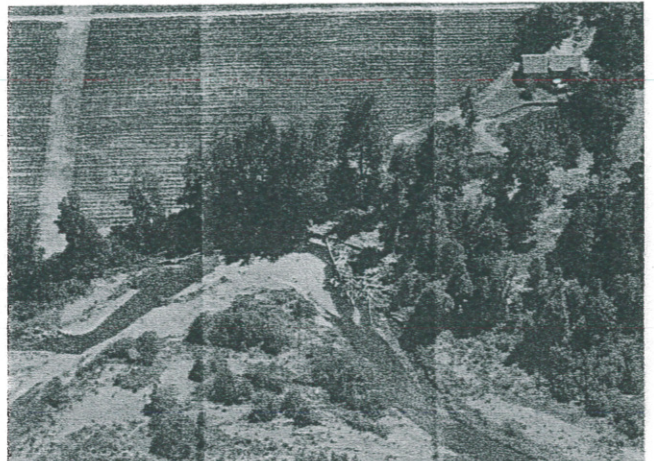
Q So you think he's wrong?

A I'd say it would be impossible for him to know that. I'd say it would be impossible for him to



know that. I'd say he's making conjectures. It would be impossible for the fishery guy to know it, from the OF&W. It's an impossibility.

Pursuant to DSL/OSP's fill and removal investigation, they documented the effected section of Sucker Creek with an aerial photo. DSL Enforcement Team Leader Steve MORROW mailed me a print of the aerial photo in November 2002 which I scanned into my computer as shown in Figure 4. The photo indicates the active channel on July 4, 2002 along the south bank within KERIVAN's property.



**Figure 4** Sucker Creek's active channel running along the south bank within KERIVAN's property. Photo courtesy of DSL, taken on July 4, 2002.

On November 14, 2002, OSP Trooper Martin MARCHAND relayed information from a complainant (b) (6) regarding the alteration of Sucker Creek. MARCHAND explained that he was prevented from investigating the case due to an injunction against state enforcement of the fill and removal statute against KERIVAN. I contacted (b) (6) the same day and he reported that heavy equipment was used to change the active channel of



**Figure 5** Sucker Creek showing split flows between active channel (left), and new channel (right). Photo taken by SA Houseman, Nov. 19, 2002.



**Figure 6** Berm created in Sucker Creek to divert flow. Photo taken by SA Houseman, Nov. 19, 2002.

Sucker Creek. (b) (6) stated, and I later confirmed on November 19 with a site visit and interview, that a 300-foot long by 6-foot high berm was created to divert the active channel. Two culverts were installed that maintained flow through the active channel. These actions created a split flow of Sucker Creek (Figures 5-6). The majority of flow was traveling down the new channel (Attachment #10).

On November 19, 22, 25, and December 13, NOAA Fisheries Biologist Chuck WHEELER and I conducted site visits to determine any adverse effects on SONC coho salmon. Photos from these site visits are included as separate attachments: November 19 (Attachment #11), November 22 (Attachment #12), December 13 (Attachment #13). On November 25, I observed that large rip-rap had been placed along the upstream portion of the berm and two 18" culverts under the berm.

On December 13, WHEELER and I observed six SONC coho and six chinook salmon unable to migrate through the culverts. According to WHEELER, the flow through the culverts was too great for SONC coho and chinook salmon to successfully travel through the culverts. This was due to a 5-foot height differential between the old and new channels that created head pressure and increased flow velocity through the culverts (pers. comm. 12/13/03). During a subsequent interview with (b) (6) on December 13, he identified PICKLE from a photo lineup as the equipment operator in early November 2002 (Attachment #14).

As shown in Attachment #15, according to the EPA's December 9 Compliance Order, KERIVAN's actions constituted unlawful "... dredge and fill activities within the natural channel, adjacent wetlands, and floodplain below the ordinary high water level of Sucker Creek." Also, EPA's findings include:

The berm created by Pickle blocks Sucker Creek's flow into the natural channel on the south side and diverts the flow into to a new channel on the north side of the creek that was excavated through a former gravel bar by Respondent Pickle. The berm impedes natural stream processes such as overbank flooding and the free flow of the creek into its adjacent wetlands and floodplain.

In addition, included in Attachment #16 are EPA correspondences with KERIVAN and his law firm Black/Helterline related to the alleged unlawful dredge and fill activities conducted on Sucker Creek.



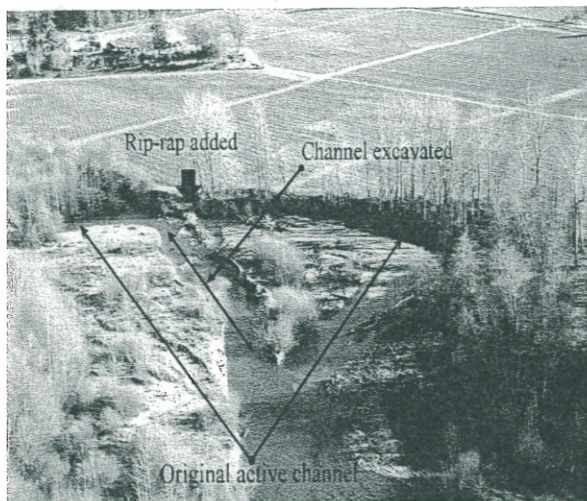
On December 17, I participated in a meeting with Attorneys Clarence GREENWOOD and Eric TENBROOK representing Bridgeview Vineyards, Inc., and KERIVAN. Also present at the meeting were DSAC SPRINGER, ASAC CLINE, WHEELER, NOAA GCEL Attorney Niel MOELLER (conference call), EPA Assistant Regional Counsel Deborah HILSMAN, and VALLETTE in EPA's Portland office to discuss the CWA and ESA violations.

On February 5, 2003, as shown in Attachment #17 (page 7), WHEELER's statement of effects articulate significant adverse effect to SONC coho salmon as follows:

In summary, stream channel alteration and construction of a berm within the Sucker Creek channel significantly modified and degraded SONC coho salmon habitat. The heavy equipment used in the stream channel likely killed and injured threatened SONC coho salmon. The alteration will continue to kill or injure coho salmon by significantly impairing essential coho behavioral patterns, including spawning, rearing, and migrating. SONC coho habitat modification or degradation included: 1) Construction of a berm that acted as a migration impediment, 2) Degradation of spawning and rearing habitat. 3) Constriction of the stream channel with displacement of stream flow energy to downstream areas, which may lead to additional bank erosion, down cutting and detrimental effects on spawning and rearing habitats downstream of the affected reach. 4) Loss of reach functionality, through alteration of essential anadromous fish habitat features, with a commensurate disruption of essential coho behavioral patterns.

On February 27, I conducted a site visit in response to a compliant from (b) (6) concerning additional rip-rap being placed in Sucker Creek by KERIVAN. Attachment #18 are photos from the site visit. (b) (6) also took photos in mid-January during the placement of additional rip-rap (refer to March 27, 2003 entry on page 12).

On March 5, I received six digital photos from MORROW documenting alterations to Sucker Creek (Attachment #19). Figures 7 and 8, which were taken in early February 2003 by Eye in the Sky, Inc., 3700 Hosmer Lane, Gold Hill, OR 97525, record the rip-rap added to deflect flows, the new channel excavated, culverts, and the original channel.



**Figure 7** Aerial photo of Sucker Creek showing rip-rap added, channel excavated, and original active channel. Photo courtesy of Eye in the Sky, Inc., February 2003.



**Figure 8** Aerial photo of Sucker Creek showing rip-rap added, excavated channel, original active channel, and culverts. Photo courtesy of Eye in the Sky, Inc., February 2003.

On March 26, I conducted a telephone interview with KERIVAN concerning the alterations to Sucker Creek. KERIVAN explained that over the past three years he had experienced the loss of seven acres due to erosion from Sucker Creek. During those three years he described litigation with DSL, OSP, and OR Department of Justice related to his removal-fill activities and eventual injunction supporting his actions. In an effort to curtail the erosion of his property, KERIVAN stated “on November 4, 2002, I cleared a gravel plug that had developed in Sucker Creek.” To that end, he designed and directed the project and asked employee/relative Howard PICKLE to operate heavy equipment and assist in the project. A tractor with a thumb device was used to place two 18-inch culverts under the rip-rap berm. To hold down the culverts, three 3-ton boulders were placed on top of two culverts. The tractor was also



used to place additional rip-rap into Sucker Creek and to excavate through “an upland” creating a new channel to deflect flow away from his property. He described himself as a former hatchery farmer who raised rainbow trout and was familiar with their life history and habitat requirements. Therefore, he placed culverts under the berm to maintain flow through the old channel. He felt his actions improved fish habitat by creating “off-channel areas” (Attachment #20).

On March 27, 2003, I received five photo negatives from (b) (6) concerning additional rip-rap material placed on top of the berm by heavy equipment. (b) (6) photos were taken in mid-January following a large storm event (Figures 9-10 and Attachment #21). According to (b) (6), KERIVAN was present while the additional rip-rap was placed on top of the berm installed in November 2002.



**Figure 9** Additional rip-rap being placed in Sucker Creek with heavy equipment in mid-January 2003, photo by David Reyes.



**Figure 10** Additional rip-rap placed in Sucker Creek with heavy equipment in mid-January 2003, photo by David Reyes.

On August 20, in response to a request from WHEELER, I conducted a site visit to Sucker Creek and documented the site with photos (Attachment #22). In addition, I observed that a low flow was moving through the old channel, the water temperature was 68°F, and no juvenile salmonids were observed.

**WITNESSES:**

1. (b) (6)
2. Yvonne VALLETTE, EPA Wetland Ecologist, 811 SW 6<sup>th</sup> Avenue, 3<sup>rd</sup> Floor, Portland, OR 97204, 503-326-2716, [vallette.yvonne@epa.gov](mailto:vallette.yvonne@epa.gov).
3. Chuck WHEELER, NOAA Fisheries Biologist, 2900 NW Stewart Pkwy., Roseburg, OR 97470, 541-957-3379, [chuck.wheeler@noaa.gov](mailto:chuck.wheeler@noaa.gov).

**SUMMARY:** Alterations of the active creek channel by KERIVAN, PICKLE, and Bridgeview Vineyards, Inc., caused "harm" to SONC coho salmon in violation of the ESA .

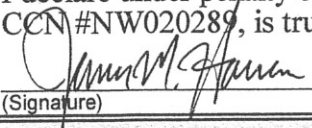
**LIST OF SEIZED PROPERTY:** N/A

**LIST OF ATTACHMENTS:**

1. 16 USC § 1538;
2. Vol. 62 FR No. 87, published May 6, 1997, and promulgated in 50 CFR § 223.102 (a)(4);
3. Vol. 62 FR No. 138, published July 18, 1997, and promulgated in 50 CFR § 223.203 (a);
4. Vol. 64 FR No. 215, published November 8, 1999, and promulgated in 50 CFR § 222.102;
5. Vol. 64 FR No. 86, published May 5, 1999, and promulgated in 50 CFR § 226.210;
6. Bridgeview Vineyards', Inc. internet postings retrieved on 12/11/2002;
7. True copy of Bridgeview Vineyards' Articles of Incorporation, receive December 10, 2002;
8. Josephine County Assessor's Office correct copy of bargain and sale deed for parcel IV(tax lot 1001), located in Township 39 South, Range 8 West, Section 36, Willamette Meridian, OR;
9. Josephine County Circuit Court Partial Summary Judgement for KERIVAN on July 11, 2002 and subsequent clarification letter on October 24; received from Oregon Department of Justice



- Attorney Todd AINSWORTH on November 20, 2002; and correspondence between KERIVAN, DSL Resource Coordinator Perry LUMLEY, and DSL Director Paul CLEARY dated January 29, February 5, and February 23, 1999 respectively; one copy only with original OIR;
10. Memorandum of Interview with REYES on November 19, 2002;
  11. Photos taken on November 19, 2002, showing alterations to Sucker Creek;
  12. Photos taken on November 22, 2002, showing vineyards and post spawn chinook salmon;
  13. Photos taken on December 13, 2002, showing alterations to Sucker Creek;
  14. Photo lineup identification of PICKLE conducted by (b) (6) on December 13, 2002;
  15. EPA Compliance Order to KERIVAN; email from VALLETTE on December 9, 2002;
  16. Supplemental correspondence between EPA and KERIVAN's law firm Black/Helterline;
  17. NOAA Fisheries Biologist WHEELER's statement of effects on the alteration of Sucker Creek;
  18. Photos taken on February 27, 2003, following placement of additional rip-rap;
  19. Email photos from DSL Enforcement Team Leader MORROW documenting alterations to Sucker Creek, received on March 7, 2003;
  20. Memorandum of Interview with KERIVAN on March 26, 2003;
  21. (b) (6) photos from mid-January 2003, showing additional rip-rap placed on top of previous rip-rap from November 2002;
  22. Photos taken on August 20, 2003, documenting low flow conditions in the old channel.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing OIR, CCN #NW020289, is true and correct to the best of my knowledge.		
 (Signature)		Executed on: 3/15/04 (Date)
Officer's Name	I.D. Number	Duty Station/Vessel
James M. Houseman, Special Agent	2271	Roseburg, Oregon